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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PAMELA J. MCLEOD, Petitioner,

v.

OREGON LITHOPRINT, INC.,dba News-Register Publishing Co.; and NEWS-REGISTER EMPLOYEES' INSURANCE PLAN, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The Employee Retirement Security Act of 1974 (ERISA) provides that a civil action may be brought to obtain appropriate equitable relief to redress violations of ERISA. 29 U.S.C. §1132(a)(3).

Petitioner hereby petitions for a Writ of Certiorari to the Ninth Circuit Court of Appeals with respect to the following issues:

1. Does "appropriate equitable relief" include the surcharging of a negligent ERISA fiduciary to provide monetary restitution or compensatory relief which would restore lost benefits and put the participant in the position he or she would have been if the plan fiduciary had not committed a breach of fiduciary duty?

2. Once equitable jurisdiction has been exercised over a fiduciary matter, does the court of equity have the traditional authority under the common law "equitable clean-up doctrine" and 29 U.S.C. §1132(a)(3) to grant complete relief in the form of compensatory and emotional distress damages?

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I. PETITION FOR WRIT OF CERTIORARI

Pamela J. McLeod respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit to resolve a split of authority with the Third, Sixth, and Eighth Circuits.

II. OPINIONS BELOW

This Court vacated the original judgment for Defendants and remanded the case to the Ninth Circuit Court of Appeals"... for further consideration in light of this court's opinion in Varity v. Corp. v. Howe...." The latest opinion of the Ninth Circuit following remand is reported at McLeod v. Oregon Lithoprint, Inc.102 F3d. 376 (9thCir 1996). (App., pp. 1-6).

The prior opinion of the Ninth Circuit Court of Appeals in McLeod v. Oregon Lithoprint, Inc. (App., pp. 7-17) was reported at 46 F.3d 956 (1995), vacated and remanded 516 U.S. ___, 116 S.Ct. 1346, 134 L.Ed.2d. 51. The opinion of the District Court (App., pp. 18-27) is unreported.

III. JURISDICTION

The Ninth Circuit Court of Appeals entered its opinion and judgment on December 20, 1996 (App., pp. 1-6). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

IV. STATUTORY PROVISION INVOLVED

McLeod seeks relief under 29 U.S.C. § 1132(a)(3 which reads, in pertinent part, as follows:

> "A civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or

(ii) to enforce any provision of this subchapter or the terms of the plan . . . ."

V. STATEMENT OF THE CASE.

A. Proceedings Below.

Following remand from this Court, the Ninth Circuit held that appropriate equitable relief under ERISA does not include monetary relief against ERISA fiduciaries for benefits lost because of the negligent conduct of the fiduciary. Summary of Prior Proceedings:

1. District Court Summary Judgment.

In the United States District Court for the District of Oregon, District Judge Malcolm Marsh granted summary judgment for the Respondents, Oregon Lithoprint, Inc. Petitioner McLeod appealed to the Ninth Circuit Court of Appeals.

2. Ninth Circuit's Original Decision

The Ninth Circuit affirmed the District Court's decision granting summary judgment for the Respondents on the ERISA breach of fiduciary duty claim and reversed the District Court, in part (not at issue here),with respect to a claim for statutory penalties for failure to provide documents requested pursuant to 29 U.S.C. § 1024(b)(4)

3. First Petition for Certiorari and Per Curium Order

This Court granted McLeod's Petition for Certiorari on April 1, 1996, (with respect to the question of whether an plan participant could bring a claim for individual relief under 29 U.S.C. 1132(a)(3) and issued the following Per Curium Order:

"The petition for a writ of certiorari is granted. The

judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Varity Corporation v. Howe, 516 U.S. ——— (1996). Justice Scalia would deny certiorari." : 516 U.S. ____, 116 S.Ct. 1346 (1996).

4. Ninth Circuit Decision Following Remand.

The Ninth Circuit affirmed the District Court and held that Plaintiff has no remedy under ERISA to recover lost benefits suffered as a result of the negligent conduct of an ERISA fiduciary.

Plaintiff has now filed this second Petition for Certiorari to request review of the Ninth Circuit's decision and to determine whether monetary relief is available to restore lost benefits.

B. Statement of Facts.

McLeod was a participant in an employee benefit plan sponsored by her employer, Oregon Lithoprint, Inc. McLeod has alleged that Oregon Lithoprint, Inc., a plan fiduciary, breached its fiduciary duty by failing to timely notify her of her eligibility to apply for cancer insurance coverage under the plan. McLeod seeks to surcharge the fiduciary for breach of trust in the amount of the benefits she would have been entitled to receive had she been able to enroll in the cancer insurance coverage. McLeod also seeks damages for emotional distress.

C. Basis Of Federal Court Jurisdiction.

This action was brought under 29 U.S.C. Section 1132(a)(3). The Federal Courts have exclusive jurisdiction of civil actions brought under ERISA. 29 U.S.C. Section 1132(e)(1).

VI. REASONS FOR GRANTING THE PETITION

A. Introduction.

On March 19, 1996, this court in Varity Corp. v. Howe, 516 U.S. ___ 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) held that a participant may bring an individual claim for relief under 29 U.S.C. § 1132(a)(3) for a violation of ERISA fiduciary duties under 29 U.S.C. § 1104(a) with respect to an employee benefit plan. In Varity, this Court described 29 U.S.C. § 1132(a)(3) and the phrase "other appropriate equitable relief" as a catch-all safety net available to remedy breaches of fiduciary duty where no other remedy was available under the statute. Varity 116 S. Ct. at 1077-78.

This Petition presents the question, not decided in Varity, of whether the relief to restore benefits lost due to a breach of fiduciary duty is available as "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3). A decision of this Court is necessary to resolve a conflict in the Circuit Courts on an important issue which potentially impacts the employee pension and welfare plans of millions of employees.

B. Conflicts Among the Circuits.

The Ninth Circuit held in McLeod v. Oregon Lithoprint, Inc., 102 F.3d. 378 (9th Cir. 1996) that participants in employee benefit plans may not seek monetary relief under 29 U.S.C. § 1132(a)(3) for recovery of lost benefits resulting from a breach of fiduciary duty. While the Ninth Circuit described McLeod's claim as seeking "...to be made whole through an award of money damages equal in amount to the benefits that she would have been paid and compensation for her emotional distress," the Court refused to characterize the requested relief as restitutionary and/or equitable. In characterizing the requested relief as "compensatory damage," the Ninth Circuit held that it was not "equitable relief" and therefore was unavailable under Section 1132(a)(3). McLeod v. Oregon Lithoprint, Inc., 102 F3d. at 378.

The Third, Sixth and Eighth Circuits have followed the opposite approach and specifically allowed monetary relief as "appropriate equitable relief" under § 1132(a)(3)

Contrary to the Ninth Circuit, the Third, Sixth and Eighth Circuits, in holding that monetary relief is available, have followed the approach which was suggested in Justice Brennan's concurring opinion in Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 149, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)[1]

The Ninth Circuit has not adopted the approach suggested by Justice Brennan, and has held that all monetary, extra-contractual and compensatory relief is excluded from the scope of "appropriate equitable relief".

Third Circuit

In Bixler v. Cent. Pa Teamsters Health-Welfare Fund, 12 F.3d 1292 (3rd Cir. 1993) the Court held that a deceased participant's estate could bring a claim under Section 1132 (a)(3) to recover medical expenses and death benefits for which the participant would have been eligible to receive coverage had it not been for a breach of fiduciary duty.

In the case of In re Unisys Corp. Retiree Medical Benefits "ERISA" Litig., 57 F.3d. 1255, 1269 (3d. Cir. 1995) cert. den. 116 S.Ct. 1316 (1996),, the Third Circuit further characterized back-benefits which the plaintiffs would have been entitled to receive but for the breach of fiduciary duty as "restitutionary reimbursement for back benefits * * * [t]hese are remedies which are restitutionary in nature and thus equitable." 57 F.3d. at 1269.

The Third Circuit in Unisys also specifically noted the contrary views of the Ninth Circuit with respect to extra-contractual damages. In re Unisys, 57 F.3d. at 1268-69 FN 21.

Sixth Circuit

The Sixth Circuit in Warren v. Society Nat. Bank, 905

F.2d 975 (6th Cir. 1990) cert. den. 111 S.Ct. 2256 (1991) held that plaintiff could recover the monatary value of lost tax benefits which he was deprived of receiving because of the alleged negligence of the defendant fiduciary. The Court held that Section 1132(a)(3) "...[P]ermits the recovery of compensatory damages to redress a direct injury to a participant by a fiduciary that allegedly violated its contractual duty under the terms of the retirement plans and under the provisions of ERISA." Warren v. Society Nat. Bank, 905 F.2d. at 981 (6th Cir. 1990). But cf. Fraser v. Lintas: Campbell-Ewald, 56 F.3d. 722,725 (6th Cir. 1995)(Dicta: "In our view, Mertens effectively overrules Warren").

The Sixth Circuit specifically found that "In light of the plain language of the statute, the common law of trusts, and the role of courts of equity . . . the damages sought by Dr. Warren are recoverable as "other appropriate equitable relief" under section [1132(a)(3)." Id at 982.

The Sixth Circuit has also held that monetary relief in the form of front and back pay under § 1132(a)(3) are "appropriate equitable relief" under § 1132(a)(3), to compensate an employee for a retaliatory discharge in violation of § 1140. Schwartz v. Gregori, 45 F.3d 1017 (6th Cir. 1995), cert den 116 S.Ct. 77 (1995). The Court characterized the back pay as "restitutionary" because it "... operates to restore to the plaintiff that to which she would have enjoyed but for the employer's illegal [conduct]." Id at 1022-23.

Eighth Circuit

The Eighth Circuit opinion in Varity v. Howe, 36 F.3d. 746, clarified 41 F.3d. 1263 (other issues aff'd at 116 S.Ct. 1065 (1996)) also disagrees with the Ninth Circuit on the question of whether the restoration of benefits which were denied to participants because of the breach of fiduciary duty is a form of equitable relief permitted under Section 1132(a)(3):

> "* * * The Retired Class should receive $696,195, an award in the nature of restitution

to compensate them for benefits of which . . . they had been deprived ***.

"In this way, the Retired Class and the individual plaintiffs will be restored to the position they would have occupied if the misrepresentations described . . . had never occurred ***.

"The relief awarded includes payments of money that plaintiffs would have received if they had remained members o f the M-F Plan, but we do not think these payments can properly be characterized as 'damages,' and thus unavailable under Section 503(a)(3) [1132(a)(3)]. Rather, we view the payments as restitution. Equity will treat that as done which ought to have been done. *** The payments we are ordering are exactly what plaintiffs would have gotten if they had remained a M-F. They are restored to their rightful position. This is restitution, and the Supreme Court in Mertens twice lists "restitution" as a type of equitable relief available under Section 502(a)(3) [1132(a)(3)] ***." Varity v. Howe, 36 F3d. at 756 (8th Cir. 1994)

The question of whether a monetary restoration of benefits constitutes "appropriate equitable relief" was not at issue or decided by the Supreme Court in Varity v. Howe, 116 S.Ct.1065 (1996).

C. The Ninth Circuit Decision is Wrong.

The Ninth Circuit improperly interpreted § 1132(a)(3) to exclude monetary relief to restore benefits which are lost as a result of a breach of trust. The Court characterized such relief to be "compensatory" and thus unavailable under the statute.

In reaching its decision, the Ninth Circuit failed to follow this Courts' instructions on remand to further consider the case in light of the decision in Varity v. Howe. See:

McLeod, cert granted 516 U.S. ___, 116 S.Ct. 1346 (1996). In Varity, this court analysed the scope of Section 1132(a)(3) using the language of the Act, the purpose of the Act and pre-ERISA trust law. The statutory provision was also stated to be a catch-all safety net intended to protect participants who did not have a remedy under any other provision of the statute.

The Ninth Circuit did not follow the directions of this Court to consider the case in light of the principles set forth in Varity v. Howe. The position of the Ninth Circuit is not based upon an independent construction of the statutory language in § 1132(a)(3) after considering the language of the Act, the purpose of the statute, or pre-ERISA trust law. The Ninth Circuit also failed to consider the implications of this Courts' characterization of Section 1132(a)(3) as a catch-all safety net intended to protect plan participants when no other remedy existed under the statutory scheme. Varity 116 S.Ct. at 1077-79.

Instead, the Ninth Circuit applied Mertens v. Hewitt & Associates, 508 U.S. 248, 113 S.Ct. 2063, 2068-2069, 124 L.Ed.2d 161 (1993)(equitable relief is limited to traditional equitable remedies in cases involving conduct of non-fiduciaries); and Sokol v. Bernstein, 803 F.2d 536 (9th Cir. 1986)(applied this court's analysis of §§ 1109(a) and 1132(a)(2) in Massachusetts Mutual v. Russell, to hold that extra-contractual relief was unavailable under § 1132(a)(3)

Mertens is distinguishable because it involved non-fiduciary conduct as opposed to the alleged breach of fiduciary duty involved in this case. In addition, Mertens specifically listed "restitution" as a form of "appropriate equitable relief." 508S.Ct. at 2068-69.

Any continuing reliance on Sokol v. Bernstein by the Ninth Circuit is misplaced because its reasoning has been severely undermined by this Court's decision in Varity 116 S.Ct. at 1076, which expressly disclaimed any reliance on Massachusetts Mutual v. Russell in its' interpretation of Section 1132(a)(3). In deciding Sokol, the Ninth Circuit relied heavily on the Russell decision to interpret Section

1132(a)(3).

The Ninth Circuit rejected the argument that the types of relief which may be awarded by a court of equity against a fiduciary for breach of its duties might be different than that which might be available against a non-fiduciary. Also, by characterizing the restoration of lost benefits as "compensatory" the Ninth Circuit avoided any consideration of whether such a remedy was a form of "restitution" permitted under Mertens.

Nothing in Mertens prevents the scope of "appropriate equitable relief" in claims against a fiduciary to restore lost benefits from being broader than the types of relief permitted against non-fiduciaries. In fact, the decision specifically states that the scope of relief can be interpreted in more that one manner and that "...it remains a question of interpretation in each case which is intended." 1135 Ct. at 2069 (emphasis in original). Mertens, supra 113 S.Ct. at 2068-2069. The differences between the limits of fiduciary v. non-fiduciary conduct are significantly great to warrant different interpretations of the scope and types of "equitable relief" which might be "appropriate" in each case.

The question of whether "appropriate equitable relief" includes those categories of relief that were "typically available in equity" for a fiduciary's breach of duty (such as "make-whole" types of compensatory relief and other relief under the "equitable clean-up" doctrine) was also left unanswered in Mertens.

Once it is established that benefits have been lost due to a breach of fiduciary duty, the court of equity should consider whether further compensatory damages are appropriate under the equitable "clean-up doctrine." D. Dobbs, Remedies, Section 2.7, p. 83 (1973)(". . . the chancellor who granted equitable relief had jurisdiction to go on and grant damages as well, as a matter of economy of litigation"). While compensatory damages for emotional distress are the classic form of legal relief, they may also become appropriate equitable relief when no adequate remedy at law exists to provide complete relief. See D. Dobbs, Remedies, Section 2.5, p. 57 (1973).

When equitable jurisdiction has attached, courts of equity have endeavored to provide complete relief.[2] A court of equity may grant compensatory damages when they are given in addition to or incident to some other equitable relief and when special circumstances require to promote the ends of justice. 3 J. Pomeroy, Equity Jurisprudence, Section 237d, p. 436-37 (5th ed. 1941). In amending ERISA to provide stronger penalties for fiduciary violation, Congress stated its intention that ERISA permits awards of compensatory damages for breaches of fiduciary duty[3].

In this instance, complete relief for Petitioner would include a remedy of compensatory damages which are not available at law because of the preemptive effect of ERISA and because of the traditional jurisdiction over trust relationships. The Supreme Court in Mertens stated that the types of relief typically available in courts of equity continue to be available. Mertens 508 S.Ct. at 2068-69. There is nothing in ERISA or its statutory history to indicate that Congress intended that the Federal Court's equitable jurisdiction or power to grant equitable relief should be abdicated in any way. The traditional equitable principle of providing complete relief should also apply. To this end, the Supreme Court has indicated that damages for mental anguish are available under § 1132(a)(3). Ingersoll-Rand v. McClendon, 498 U.S. 113, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990).

D. The Importance of the Issue.

This Court in Varity stated that it is difficult to imagine why Congress would want to immunize fiduciaries from liability for breach of their duties to plan participants. Varity 116 S.Ct. at 1078. However, the Ninth Circuit has ignored Varity and effectively immunized fiduciaries from such liability by holding that monetary relief is unavailable under Section 1132 (a)(3).

Serious problems exist with ERISA when it is

possible for a plan fiduciary, whose duty it is to protect participants and safeguard benefits, to engage in fraudulent, bad faith or negligent conduct without any remedy existing for the restoration of lost plan benefits. The thought that, in addition to possible negligent conduct, an employer-fiduciary could intentionally deceive an employee about his or her benefits,[4] or an insurance company could in bad faith deny coverage for potentially life saving medical benefits[5] without any remedy under either state law or ERISA is astonishing.

Individual workers in the Ninth Circuit do not have any means of making themselves whole through monetary relief because of the following decisions:

(1) In McLeod v. Oregon Lithoprint, Inc., 102 F.3d. 376 and 46 F.3d 956 (9th Cir. 1995) vacated and remanded 116 S.Ct. 1346 (1996), the Ninth Circuit held that a participant deprived of benefits because of an ERISA fiduciary's negligence has no remedy under ERISA.

(2) In Watkins v. Westinghouse Hanford Co., 12 F.3d 1517 (9th Cir. 1993), the Ninth Circuit held that an individual participant had no remedy under ERISA when a fiduciary knowingly misrepresented the terms of the plan to a participant.

(3) In Sokol v. Bernstein, 803 F.2d 536 (9th Cir. 1986), the Ninth Circuit held that claims for violations of ERISA fiduciary duties could only be brought on behalf of the plan as a whole under 29 U.S.C. § 1132(a)(3) and that extra-contractual relief in unavailable.

If ERISA is not interpreted to effectively safeguard employee benefits, then Congress has created a law which permits ERISA fiduciaries to completely escape liability for fraud, knowing misrepresentations and negligent conduct via preemption of state law claims and inadequate remedies under ERISA.

By interpreting § 1132(a)(3) to permit the federal courts to use their full equitable powers typically available in breach of trust cases, to the extent appropriate, this Court can restore the Court of Equity's traditional role in the conduct of fiduciary relationships and preserve the safeguards intended by Congress.

If this Court holds that individual participants may not bring claims for monetary relief resulting from breaches of fiduciary duty under ERISA, fiduciaries will be permitted and possibly encouraged to ignore the fiduciary standards in ERISA when dealing with individual participants. While most fiduciaries undertake their duties seriously and in good faith, others may have serious conflicts of interest which need closer review. It is impossible to assure full disclosure, fair claims adjustment and good faith conduct by fiduciaries without adequate remedies.

E. The Need for a Uniform Test.

The courts have used a variety of terms and tests to attempt to formulate a workable standard for determining whether relief requested in a particular case is within the scope of "appropriate equitable relief" available under 29 U.S.C. § 1132(a)(3)

Various cases have suggested a number of different approaches or tests, but no test has been uniformly adopted and none are without significant problems. A need exists for a uniform standard which can be applied by all of the lower courts to analyze the requested relief in a particular case and determine whether or not it is available under § 1132(a)(3). The existing terminology and tests which have been suggested or applied by various courts include the following:

E.(1) Contractual v. Extra-Contractual Relief. Extra-contractual relief is the terminology used in Russell v. Massachusetts Mutual Life Ins., Co., 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) to analyze whether emotional distress damages were available under 29 U.S.C. § 1109(a) and § 1132(a)(2). The ninth Circuit applied this approach to

Section 1132(a)(3) in Sokol v. Bernstein, 803 F.2d 536 (9th Cir. 1986) which was, in turn, relied upon in the McLeod decision. McLeod 102 F.3d at 378. This Court disclaimed reliance upon Russell in reaching its decision in Varity which interpreted Section 1132(a)(3).

The contractual v. extra-contractual terminology should be abandoned because it does not address the statutory standard and does not provide a meaningful framework to provide assistance to litigants or the lower courts in future cases.

E.(2) Legal Relief v. Equitable Relief. "Legal" v. "equitable" relief is the basic distinction which was used by this Court in Mertens to determine that non-fiduciaries could not be held joint and severally liable under ERISA. The court in Mertens recognized that courts of equity can sometimes grant "legal relief" but a determination would have to be made in each particular case which interpretation was intended. Mertens, 113 S.Ct. at 2068-2069. The Court recognized the broad range of possible interpretations of the term "equitable relief" but did not specify the types of relief which would be available in cases involving a breach of fiduciary duties to the plan participants.

Because the types of remedies available to a court of equity have traditionally been those remedies necessary to provide complete relief and correct the wrong, it is not historically correct to simply assume or state that equitable relief does not include types of relief which we now consider to be "legal relief". The federal courts have frequently recognized the ability of a court of equity to grant monetary relief.[6]

The common law of trusts has traditionally granted equitable monetary relief to recover losses resulting from a breach by a trustee. See Restatement (Second) of Trusts, §§ 197, 199, and 205. Technically, the equitable remedy for surcharging a breaching fiduciary is called an "equitable debt"[7] which may be enforced by the exercise of the court's personal jurisdiction over the trustee and the court's contempt powers.

The courts of equity have traditionally exercised jurisdiction over trust matters because the trust relationship is considered to be a primary right subject to equitable jurisdiction and not simply because of any unique remedy available only in the courts of equity.[8]

In addition to being a system which provides unique remedies, the equity courts have also defined and supervised primary rights, such as the trust relationships. When a breach of trust occurs, it was traditionally the court of equity which supervised the conduct of the trustee and had the ability to surcharge the trustee for losses resulting from any breach.[9] The fact that courts of equity may provide monetary relief has been frequently recognized by this court both in its decisions and its rules.[10]

Once a court of equity has assumed jurisdiction over a matter, it has traditionally granted any type of relief which is necessary to provide complete relief to remedy the wrongs.

E.(3) Compensatory/Monetary v. Non-Monetary Relief.

Some courts have tried to limit "equitable relief" based upon whether or not the requested relief is "monetary" or "compensatory" relief. While some equitable remedies (i.e., constructive trusts, injunction and mandamas) were only available in courts of equity, equitable relief has never been limited to these non-monetary forms of relief.[11] Whether the type of relief is referred to as monetary, pecuniary or compensatory, courts of equity have traditionally provided for the payment of money as a form of equitable relief.[12]

The Federal Rules of Equity Practice specifically contemplated the payment of money as part of an equity decree.[13]

Any attempt to limit "appropriate equitable relief" to non-monetary forms of relief fails to recognize the historical realities of the types of relief available to a court of equity. In addition, any artificial distinction will only raise new issues

concerning whether forms of restitution, constructive trusts, equitable liens, equitable debts, etc., are monetary or non-monetary forms of relief. The courts of equity did not historically make this type of distinction and lower courts will need to start over from a clean slate, rather than having the ability to rely on the existing common law to determine whether a particular form of relief requested in a specific case is available under ERISA.

F. The Federal Courts Must Guard Their Constitutionally-Granted Power to Grant Equitable Relief.

Congress provided for "appropriate equitable relief." In the absence of a clear mandate that Congress intended to limit the federal courts' power to apply the full scope of the remedies available pursuant to the equitable powers of the court this Court should interpret the phase "appropriate equitable relief to encompass the full extent of the court's power to form equitable remedies in breach of trust cases.[14]

The only statutory limitation in 1132(a)(3) is whether of not the equitable relief is "appropriate" under the facts of the case, the scope of common law equitable jurisdiction and the purposes of ERISA.

To avoid rendering the fiduciary duties of ERISA futile when applied to individual participants, courts must "resume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." Davis v. Passman, 442 U.S. 228, 246, 99 S.Ct. 2264, 2277, 60 L.Ed.2d 846 (1979); Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028, 1032 (1992). It is the duty of the courts to be alert to provide such remedies as are necessary to make effective the legislative purpose." J.I. Case Co. v. Borak, 377 U.S. 426, 433, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423 (1964)

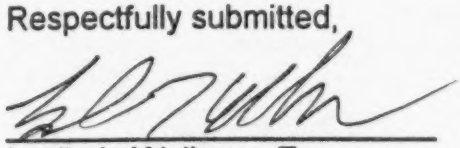
Failure by the Courts to utilize their full equitable powers granted by Congress to redress violations of ERISA by fiduciaries may violate the separation of powers by

rendering causes of action authorized by Congress futile through decisions that no remedy or inadequate remedies are available.

VII. CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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October 1996

VIII. FOOTNOTES

1

In the concurring opinion in Russell, Justice Brennan (joined by Justices White, Marshall and Blackman) outlined an approach for the courts to take in construing the "appropriate equitable relief" provision of ERISA. Justice Brennan noted that:

> "Trust-law remedies are equitable in nature and include provisions of monetary damages. . . . Thus while a given form of monetary relief may be unavailable under ERISA for other reasons . . . it cannot be withheld simply because a beneficiary's remedies under ERISA are denominated as 'equitable.'" 105 S.Ct. 3085, 3097 (1985) N.10 (Citations omitted). (emphasis added).

To answer the question of whether extra-contractual damages might be one form of "other appropriate equitable relief" under § 1132(a)(3), Justice Brennan suggested that:

> ". . . [C]ourts should begin by ascertaining the extent to which trust and pension law as developed by state and federal courts provide for recovery by the beneficiary above and beyond the benefits that have been withheld; this is the logical first step, given that Congress intended to incorporate trust law into ERISA's equitable remedies. * * *" 105S.Ct. 3085, 3098.

Under the common law of trusts, a beneficiary is entitled to a make-whole type of remedy "which will put him in a position in which he would have been if the trustee had not committed the breach of trust." (emphasis added). Restatement (Second) of Trusts, § 205 and Comment a. (1959). See also 3 A. Scott, Law of Trusts, § 199, p. 1638 (1967) and Bogert, Trusts and Trustees, § 862

2

Two of the fundamental principles or maxims of equity are that:

> (1) Equity regards that as done which ought to be done; and
> (2) Equity will not suffer a wrong without a remedy.

3

The report on OBRA '89 of the Committee on Education and Labor states:

> "The Committee believes that the legislative history of

ERISA and subsequent expansions of ERISA support the view that Congress intended for the courts to develop a federal common law with respect to employee benefit plans, including the development of appropriate remedies, even if they are not specifically enumerated in § 502 of ERISA. Since the issue of preemption and civil remedies under ERISA is within the exclusive purview of the labor committees of Congress, the Committee has over the years, considered the option of amending the statute to encompass specifically several additional remedies. In light of the legislative history on this issue, however, the Committee believes such action is unnecessary.

The Committee reaffirms the authority of the federal courts to shape legal and equitable remedies to fit the facts and circumstances of the cases before them, even though those remedies may not be specifically mentioned in ERISA itself. In cases in which, for instance, facts and circumstances show that the processing of legitimate benefit claims has been unreasonably delayed or totally disregarded by an insurer, an employer, a plan administrator, or a plan, the Committee intends the federal courts to develop a federal common law of remedies, drawing upon principles enunciated in state law, including such remedies as the awarding of punitive and/or compensatory damages against the person responsible for the failure to pay claims in a timely manner." House Rep. No. 101-247 to PL 101-239, 1989 U.S. Code Cong. and Admin. News, (103 Stat.) p. 1906, 1948. (Emphasis added).

The Conference Committee Report contains the following statement:

"* * * The conferees further believe that the need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of action affecting employee benefit plans. It remains the intent of Congress that the courts use their power to fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well. The conferees expect that the executive agencies and the courts will use their substantial authority to achieve these goals and to safeguard the rights of plan participants." H. Conf. Rep. No. 101-386 (1989), U.S. Cong. & Admin. News (103 Stat.) p. 3018, 3035-36. (Emphasis added).

4

Watkins v. Westinghouse Hanford Co, 12 F.3d 1517 (9thCir. 1993).

5

See: Spain v. Aetna Ins. Co, 13 F.3d. 310 (9th Cir. 1993)

6

Albermarle Paper Co. v. Moody, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 28 (1975); Board of Com'rs. of Jackson County, Kan. v. United States, 308 U.S. 343, 60 S.Ct. 285, 288 (1939) ("In ordinary suits where the government seeks . . . to enforce a money claim ultimately derived from a federal law * * * the court has drawn upon those flexible considerations of equity which are established sources for judicial law-making."); Porter v. Warner Co., 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) ("Where . . . the equitable jurisdiction of the court has properly been invoked . . . the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law."); Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332 (1960) (Monetary recovery permitted pursuant to the power of equity to provide complete relief.

7

The existence of an equitable debt as a remedy for breach of trust has long been recognized. Pomeroy describes the personal liability of a trustee as follows:

> "* * * [t]he trustee incurs a personal liability for a breach of trust by way of compensation or indemnification which becomes the only remedy whenever the trust property has been lost or put beyond his reach by the trustee's wrongful act. The trustee's personal liability to make compensation for the loss occasioned by a breach of trust is a simple contract equitable debt. It may be enforced by a suit in equity against the trustee himself. The amount of the liability is always sufficient for the complete indemnification and compensation of the beneficiary." 1 J. Pomeroy, Equity Jurisprudence, § 1080, p. 229-230 (5th ed. 1941) (emphasis added).

Pomeroy further distinguishes between a legal debt and an equitable debt as follows:

> "A debt, in its most general conception, is a personal liability for a definite sum of money, arising out of contract, express or implied, or obligation in the nature of contract. The debtor is one who is personally liable for the payment of such sum, and from whom payment can be enforced by means of a personal pecuniary judgment. If the debt is recognized by the law, and can be recovered by an action at law, it is a legal debt; if it is only recognized by equity, and not by the law, and can only be recovered in a suit of equity, the debt is equitable. * * *." 3 J. Pomeroy, Equity Jurisprudence, § 1298, p. 863 (5th ed. 1941) (emphasis in original).

8

Equity is not simply a system of remedies but rather both a system of primary rights and duties and a system of remedies:

"In order that a cause may come within the scope of the equity jurisdiction, one of two alternatives is essential; either the primary right, estate, or interest to be maintained, or the violation which furnishes the cause of action, must be equitable rather than legal; or the remedy granted must be in its nature purely equitable, or if it be a remedy which may also be given by a court of law, it must be one which, under the facts and circumstances of the case, can only be made complete and adequate through the equitable rules of procedure." 1 Pomeroy's Equity Jurisprudence, Section 130 (5th Ed. 1941) (Emphasis in original).

"* * * The traditional view is that equitable relief is denied unless the matter is one in which equity historically developed the substantive law (as in the case of trusts), or the matter is one in which the plaintiff's remedy at law is inadequate. * * *." D. Dobbs, Remedies, § 2.5, p. 57 (1973). (Emphasis added).

9

See Restatement (Second) of Trusts, §§ 197, 199 and 205 which read as follows:

"§ 197. Nature of Remedies of Beneficiaries. Except as stated in § 198, the remedies of the beneficiary against the trustee are exclusively equitable" (emphasis added).

"§ 199. Equitable Remedies of Beneficiary. The beneficiary of a trust can maintain a suit

(a) to compel the trustee to perform his duties as trustee;
(b) to enjoin the trustee from committing a breach of trust;
(c) to compel the trustee to redress a breach of trust;
(d) to appoint a receiver to take possession of the trust property and administer the trust;
(e) to remove the trustee."

"§ 205. Liability in Case of Breach of Trust. If the trustee commits a breach of trust, he is chargeable with

(a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or
(b) any profits made by him through the breach of trust; or
(c) any profit which would have accrued to the trust estate if there had been no breach of trust."

The following are examples of this Court's recognition that a decree in equity may be for the payment of money:

(1) In Clews v. Jamieson, 182 U.S. 461, 21 S.Ct. 845, 852, 45 L.Ed. 1183 (1901), the Court adopted the views of Pomeroy in describing both the scope of equitable jurisdiction over fiduciaries and the scope of equitable relief which includes monetary relief:

> "* * * The fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give 'depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, but being merely recoveries of money. * * *." 1 Pom. Eq. Jur., § 158. (Emphasis added).

(2) See also Porter v. Warner Co., 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) ("Where . . . the equitable jurisdiction of the court has properly been invoked . . . the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law."); Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332 (1960) (Monetary recovery permitted pursuant to the power of equity to provide complete relief).

(3) The United States Supreme Court's rules prior to 1954 recognized the appropriateness of monetary relief as part of an equity decree prior to the merger of the law and equity courts. Rule 30 of the Revised Rules of the Supreme Court of the United States, 306 U.S. 685 (1939) provided:

> "Rule 30. INTEREST AND DAMAGES
>
> "1. Where judgments for the payment of money are affirmed and interest is properly allowable, it shall be calculated from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.
>
> 2. * * *
>
> 3. Paragraphs 1 and 2 of this rule shall be

applicable to decrees for the payment of money in cases in equity, unless otherwise specially ordered by this court. * * *." (Emphasis added).

(4) Substantially similar language which specifically referred to "the payment of money in cases of equity" existed as Rule 23 in the Rules of the Supreme Court of the United States from 1884 until 1939. 108 U.S. 573 (1884). For prior versions of the rule referring to "the payment of money in cases of equity . . ." see 210 U.S. 441, 490 (1873) and 21 Howxiii (1858).

[11] Pomeroy provides a non-exclusive list of ten classes of remedies (including "pecuniary compensation") which can be provided by courts of equity. See 1 J. Pomeroy, Equity Jurisprudence, § 112 (5th ed. 1941). Assuming these "classes" are the equivalent of "categories of relief typically available in equity," mentioned in the Mertens decision, there should be no argument that remedies of pecuniary compensation are available in equity and courts need only determine which, if any, of the classes of remedies are "appropriate" for the circumstances of a particular case.

[12] 1, Pomeroy's Equity Jurisprudence, Section 112 (5th Ed. 1941)

[13] The Rules of Federal Equity Practice stated, in part:

"Rule 8. Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of assumpsit. * * *." 210 U.S. at 511 (1884). (Emphasis added).

"Rule 92. That in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this Court regulating the equity practice, where the decree is solely for the payment of money." 210 U.S. at 540-541. (Emphasis added).

[14] "The general rule is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028, 1035 (1992). "Selective abdication . . . would harm separation of powers principals in another way, by giving judges the power to render futile causes of action authorized by Congress through a decision that no remedy is available." Id at 1037.

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAMELA J. McLEOD, Plaintiff-Appellant, v. OREGON LITHOPRINT INC., an Oregon corporation, dba News-Register Publishing Co.; and NEWS-REGISTER EMPLOYEES' INSURANCE PLAN, Defendants-Appellees.	)	No. 92-36928 D.C. No. CV-92-00450-MFM OPINION

On Remand from the United States Supreme Court

Argued and Submitted
November 26, 1996--Portland, Oregon
Filed December 20, 1996
Before: Arthur L. Alarcon, William A. Norris, and Edward Leavy, Circuit Judges.

COUNSEL

Leslie L. Wellman,
Portland, Oregon,
for the plaintiff-appellant.

Thomas M. Christ,
Mitchell, Lang & Smith,
Portland, Oregon,
for the defendants-appellees.

OPINION

LEAVY, Circuit Judge:

This case is before us on remand from the Supreme Court, following the Court's grant of certiorari and vacation of the prior judgment in this case. McLeod v. Oregon Lithoprint Inc., 46 F.3d 956 (9th Cir. 1995), cert. granted and judgment vacated, 116 S. Ct. 1346 (1996). The Court remanded for further consideration in light of Varity Corp. v. Howe, 516 U.S._____, 116 S. Ct. 1065 (1996). The issue now before us is whether the relief which McLeod requests is available under the Employee Retirement Income Security Act ("ERISA")S 502(a)(3), codified at 29 U.S.C. S 1132(a)(3). For the reasons which follow, we again affirm the district court's entry of summary judgment in favor of the defendant.

The facts in this case are set forth in McLeod, 46 F.3d at 957. In brief summary, Pamela J. McLeod ("McLeod") filed the instant action against her employer, arguing that her employer's ERISA plan administrator breached a fiduciary duty to her under 29 U.S.C. S 1104(a) by failing to notify McLeod that she had become eligible to apply for coverage under a cancer insurance policy. McLeod seeks a judgment for the amount of benefits that would have been paid to her had she elected coverage under the cancer policy, and for compensatory damages for emotional distress.[1]

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[1] 1 McLeod's amended complaint prays, in relevant part, for a judgment (1) for "An amount equal to the amount of benefits determined at trial and other amounts which would have been paid under the AFLAC Cancer Insurance Policy if Plaintiff had been covered as of May 1, 1990"; (2) for "Plaintiff's compensatory damages for emotional distress in the amount of $100,000.00"; (3) for "A surcharge of the Defendants as fiduciaries of the Plan in the amount of Plaintiff's unreimbursed expenses and other benefits which would have been reimbursed or provided under the Cancer Insurance Policy"; and (4) for "An order requiring Defendant to reimburse Plaintiff all further expenses or benefits which would have been provided under the Cancer Coverage."

In her amended complaint, McLeod also sought a declaratory judgment that she was covered as an insured under the cancer insurance policy issued by

In our first opinion, we held that McLeod was a plan "participant" and therefore had standing to bring suit. 46 F.3d at 958-59. Nothing in Varity undermines this holding.

We also held that McLeod was precluded from bringing an action individually rather than on behalf of the plan as a whole. 46 F.3d at 960. Varity effectively overturns this holding. See 116 S. Ct. at 1079. (ERISA Section_502(a)(3) authorizes actions for individualized equitable relief for breach of fiduciary obligations). The defendant in this case, Oregon Lithoprint, concedes that, under Varity, McLeod can bring her individual action under Section 502(a)(3).

Finally, we held that McLeod was precluded from seeking the judgment she prayed for because "equitable relief" in the form of the recovery of compensatory damages is not an available remedy under Section_502(a)(3). 46 F.3d at 960. The question now before us is whether, following Varity, and on the record in this case, McLeod is precluded from seeking her requested relief under ERISA Section_502(a)(3). We conclude that she is.

"Appropriate equitable relief" under ERISA Section_502(a)(3)

ERISA's "Civil Enforcement" section, and provides:

> Sec. 502. (a) A civil action may be brought -
>
> ...(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) *to obtain other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

In Mertens v. Hewitt Assocs., 508 U.S. 248, 257-58 (1993) the Supreme Court held that the language "appropriate equitable relief" under Section_502(a)(3) does not authorize suits for money

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the defendant insurance company. McLeod's claims against the insurance company and its agent were settled prior to appeal. District Court Opinion, ER tab 60 at 2, n.2.

damages against nonfiduciaries who knowingly participate in a fiduciary's breach of duty. McLeod argues that Mertens established only that monetary relief was not available under ERISA in a claim against a nonfiduciary. Because her action is to remedy a fiduciary breach, the phrase "appropriate equitable relief" should include monetary relief in the form of compensatory damages. McLeod asserts that without monetary relief, she is left with no adequate remedy.

We reject McLeod's argument because the status of the defendant, whether fiduciary or nonfiduciary, does not affect the question of whether damages constitute "appropriate equitable relief" under Section_502(a)(3). See Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11, 13 (1st Cir. 1994). We have previously stated that the legislative history of ERISA illustrates that the entire statute was aimed at the protection of the integrity of pension plans, rather than at direct protection of each participant. See Sokol v. Bernstein, 803 F.2d 532, 537 (9th Cir. 1986). Fiduciaries under ERISA have been made subject to personal liability for losses to the plan resulting from breach of duties. See ERISA Section_409(a), 29 U.S.C. Section_1109(a).Given the statutory structure and policy compromises of ERISA, we cannot construe "appropriate equitable relief" under Section_502(a)(3) in an expanded manner on the basis that a plan participant is bringing an individual action against a fiduciary, rather than against a nonfiduciary.

The relief which McLeod seeks is not "equitable relief." She does not seek an injunction, mandamus, or restitution. The complaint does not allege fraud on the part of the plan fiduciaries. There is no allegation of a fund which was wrongfully withheld from McLeod. The basis of her complaint is that the fiduciaries failed to notify her in a timely manner of her right to elect cancer coverage. This is in essence a negligence claim, for which she seeks to be made whole through an award of money damages equal in amount to the benefits that she would have been paid and compensation for her emotional distress.

We have previously considered the scope of relief available under Section_502(a)(3) and have limited the relief under that section to equitable and not compensatory damages. See Concha v.

London, 62 F.3d 1493, 1504 (9th Cir. 1995), cert. denied, 116 S. Ct. 1710 (1996); Spinelli v. Gaughan, 12 F.3d 853, 858 (9th Cir. 1993); Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1527-28 (9th Cir. 1993); Sokol v. Bernstein, 803 F.2d at 538.[2]

McLeod argues that the Supreme Court's language in Varity provides this court with the opportunity to re-examine our previous holdings regarding "appropriate equitable relief" under Section 502(a)(3). We reject this contention. The plaintiffs in Varity were seeking reinstatement as participants in the employer's ERISA plan. Reinstatement is equitable, not compensatory, relief. The Varity opinion does not alter the holding in Mertens that compensatory damages are unavailable under Section 502(a)(3). Rather, the Varity opinion cites Mertens in response to amici concerns of the adverse consequences of extending a remedy to individual beneficiaries, stating:

> [T]he statute authorizes "appropriate " equitable relief. We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the "special nature and purpose of employee benefit plans," and will respect the "policy choices reflected in the inclusion of certain remedies and the exclusion of others." Pilot Life Ins. Co. 481 U.S. at 54, 107 S.Ct. at 1556. See also Russell,

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[2] All of the circuits which have considered the issue have held that compensatory damages are not available as "appropriate equitable relief" under S 502(a)(3). See, e.g., Armstrong v. Jefferson Smurfit Corp., 30 F.3d at 13 (1st Cir. 1994); Lee v. Burkhart, 991 F.2d 1004, 1011 (2nd Cir. 1993); Hein v. F.D.I.C., 88 F.3d 210, 223-24 (3rd Cir. 1996); Powell v. Chesapeake and Potomac Tel. Co., 780 F.2d 419, 424 (4th Cir. 1985), cert. denied, 476 U.S.1170 (1986); Sommers Drug Stores Co. v. Corrigan Enters., 793 F.2d 1456, 1462-64 (5th Cir. 1986), cert. denied, 479 U.S. 1034 (1987); Fraser v. Lintas: Campbell-Ewald, 56 F.3d 722, 725 (6th Cir. 1995), cert. denied, 116 S. Ct. 477 (1995); Harsch v. Eisenberg, 956 F.2d 651, 654-660 (7th Cir. 1992), cert. denied, 113 S. Ct. 61 (1992); Novak v. Andersen Corp., 962 F.2d 757, 759-61 (8th Cir. 1992), cert. denied, 113 S. Ct. 2928 (1993); Zimmerman v. Sloss Equip., Inc., 72 F.3d 822, 828-29 (10th Cir. 1995); McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 822 (11th Cir. 1991).

473 U.S. at 147, 105 S. Ct. at 3092-3093; Mertens, 508 U.S. at 263-264, 113 S. Ct. at 2072.

516 U.S. at _____, 116 S. Ct. at 1079.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAMELA J. MCLEOD,
Plaintiff-Appellant,

v.

OREGON LITHOPRINT INC., an Oregon corporation, dba News-Register Publishing Co.; and NEWS-REGISTER EMPLOYEES' INSURANCE PLAN;
Defendants-Appellees.

No. 92-36928
D.C. No. CV-92-00450-MFM
OPINION

Appeal from the United States District Court
for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Argued and Submitted
May 3, 1994—Portland, Oregon

Filed February 1, 1995

Before: Arthur L. Alarcon, William A. Norris, and Edward Leavy, Circuit Judges.

Opinion by Judge Leavy

Leslie L. Wellman, Wellman & Murray, Portland, Oregon, for the plaintiff-appellant.

Wade R. Keenon and William H. Mitchell, Mitchell, Lang & Smith, Portland, Oregon, for the defendants-appellees.

OPINION

LEAVY, Circuit Judge:

The appellant, Pamela J. McLeod ("McLeod"), appeals from summary judgment on her claims pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1371 (West Supp. 1994). McLeod argued before the district court that the ERISA plan administrator breached a fiduciary duty under 29 U.S.C. § 1104(a)[1] by failing to notify her that effective May 1, 1990, she had become eligible to apply for cancer insurance coverage from American Family Life Insurance Company ("AFLAC"). She contends that her employer, the News-Register of McMinnville, Oregon, did not inform her of this opportunity until July 1990. On July 19, 1990, before she was notified of the opportunity to obtain cancer coverage, McLeod's physician told her she had cancer. McLeod applied for cancer coverage on July 24, 1990. The application was granted but later rescinded when the insurance company discovered that McLeod had a previous cancer diagnosis. McLeod seeks an award of compensatory damages equal to the benefits that would have been paid to her had she elected coverage under the cancer policy. McLeod prays for compensatory damages for emotional distress in

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[1]In relevant part, section 1104(a)(1)(B) provides for a "prudent man" standard of care:

> Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]

the amount of $100,000. She also seeks statutory damages for the appellees' failure to respond to her request for the plan documentation.

Oregon Lithoprint Inc., dba News-Register Publishing Company, and the News-Register Employees' Insurance Plan argued that, as a matter of law, even if they failed to notify McLeod timely about the existence of a cancer insurance policy, she could not recover monetary damages under ERISA because she was not a plan "participant." Both parties agreed that the issue of whether McLeod was a plan "participant" as defined by ERISA was a legal question for the district court to resolve.

The district court held that McLeod was not a "participant" or "beneficiary" with respect to the cancer coverage and therefore that she "lacks standing to maintain an ERISA claim against her employer for breach of fiduciary duties or failure to provide AFLAC plan documents." The court also held that, even if McLeod had standing, she could not recover compensatory damages. The court granted defendant's motion for summary judgment. McLeod appealed.

DISCUSSION

I. *Whether McLeod Is a "Participant" Under an "Employee Benefit Plan" Subject to ERISA*

A major issue is whether McLeod was a "participant" in the cancer policy. Whether an employee is a participant in an ERISA plan is critical because it involves both standing and subject matter jurisdiction. *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434 (4th Cir. 1986). The district court found that McLeod had no standing because she was not a participant.[2]

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[2]The district court found that McLeod was not a "participant" or "beneficiary" with respect to the AFLAC cancer coverage and therefore, she "lack[ed] standing to maintain an ERISA claim against her employer

The appellees argue that McLeod is not a participant because, under the cancer plan, "it is a legal and factual impossibility for an employee to receive a plan benefit, or to be eligible for a plan benefit, *unless* there is an individual policy of insurance issued to that employee." The statutory definition of participation in an Erisa plan contradicts the appellee's conclusion:

> A civil action may be brought . . . by a participant . . . to recover benefits due to [her] under the terms of [her] plan, to enforce [her] rights under the terms of the plan, or to clarify [her] rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). A "participant" is defined as "any employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7).

[1] In determining whether McLeod is a "participant," the analysis focuses on her status of employment, not whether cancer coverage was a distinct plan or a benefit program. The fact that McLeod was not issued an actual policy does not preclude her from being a participant. "[T]he term 'participant' is naturally read to mean either employees in, or reasonably expected to be in, currently covered employment." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (quotation omitted). In construing the phrase "may become eligible" in section 1002(7), the Supreme Court

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for breach of fiduciary duties or the failure to provide AFLAC plan documents." The district court based its decision on the following factors: (1) "participant" does not include potential claimants; (2) no cases were found in which a plaintiff premised an ERISA case on the failure to disclose the existence of an available policy; (3) the cancer policy was not part of the same plan under which McLeod received disability insurance; and (4) nothing in ERISA extends liability to a claim for coverage under a policy that was never validly issued.

states: "In order to establish that he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.* at 117-18.

[2] McLeod's argument is that she was eligible *to apply* for benefits on May 1, 1990, and that she was eligible *to receive* benefits, had she applied for them by the time she was diagnosed with cancer. Thus, her employment status clearly renders her a participant. McLeod presents a "colorable claim" that she would prevail in a suit for benefits resulting from an alleged breach of fiduciary duty.[3] Because one of the two *Firestone* tests is met, McLeod is a participant and has standing. We reverse the district court on this issue.

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[3]The Sixth Circuit has held that:

> In determining who is a "participant," for purposes of standing, the definition found in 29 U.S.C. § 1002(7) must be read in the context of traditional concepts of standing, not in the context of adjudicating the ultimate issue of the merits of plaintiffs' claim that they are not receiving the full extent of the benefits to which they are entitled from the employee benefit plan . . . . The doctrine of standing is concerned with whether a person is the proper party to request adjudication of a particular issue, whether a person has alleged such a personal stake in the outcome of a justiciable controversy that [she] should be entitled to obtain its judicial resolution. Standing focuses on a person's effort to get [her] complaint before a court and not on the issue [she] wishes to have adjudicated.

Astor v. International Business Machs. Corp., 7 F.3d 533, 538 (6th Cir. 1993) (quoting *Hughes v. General Motors Corp.*, 852 F.2d 568 (6th Cir. 1988) (unpublished) (citations omitted), *cert. denied*, 489 U.S. 1081 (1989)); *accord Vartanian v. Monsanto Co.*, 14 F.3d 697, 701-02 (1st Cir. 1994).

II. *Whether McLeod May Recover for Breach of Fiduciary Duty Where No Recovery Is Sought for the Plan as a Whole*

McLeod argues there was a breach of fiduciary duty under section 404(a), 29 U.S.C. § 1104(a), which requires a fiduciary to exercise the standard of care a prudent person would exercise. *See* n.1, *supra*. For the appellees' alleged breach of fiduciary duty in failing to inform her of the cancer coverage, McLeod requests the following "equitable or remedial relief":

> (A) Surcharge of the Defendants as fiduciaries of the Plan in the amount of her unreimbursed expenses and other benefits which would have been reimbursed or provided under the Cancer Insurance Policy with prejudgment interest thereon;
>
> (B) An order requiring defendant to reimburse Plaintiff all further expenses of benefits which would have been provided under the Cancer Coverage; and/or
>
> (C) A declaratory judgment that Plaintiff is covered as an insured with Cancer Coverage under the Cancer Insurance Policy issued by Defendant AFLAC.

[3] The Supreme Court has held that a recovery for breach of fiduciary duty under section 404(a), 29 U.S.C. § 1109(a),[4]

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[4] 29 U.S.C. § 1109(a) states:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good *to such plan* any losses *to the plan* resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

(Emphasis added.)

must inure to the benefit of the plan as a whole. *Russell*, 473 U.S. at 142. We have followed *Russell* to strictly limit the remedies available under ERISA. *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1528 (9th Cir. 1993); *Sokol v. Bernstein*, 803 F.2d 532, 536, 538 (9th Cir. 1986).

[4] In *Sokol*, we held: "ERISA grants no private right of action by a beneficiary *qua* beneficiary; rather, it accords beneficiaries the right to sue on behalf of the entire plan if a fiduciary breaches the plan's terms." *Id.* In doing so, we extended the Supreme Court's holding in *Russell*, which was limited to section 409(a), 29 U.S.C. § 1109(a) only, *see Russell*, 473 U.S. at 139 n.5, to section 503(a)(3), 29 U.S.C. § 1132(a)(3),[6] as well. We stated:

> *Russell* held that the fiduciary duties set forth in § 409 run only to the plan, and not to individual beneficiaries. In so holding, the *Russell* Court used language implying that *all* of the statute's provisions relating to fiduciary duties run only to plans, and not to . . . individuals.

Sokol, 803 F.2d at 535 (citation omitted).

McLeod argues that our decision in *Sokol* conflicts with the Supreme Court's opinion in *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063 (1993). We disagree. After *Mertens* was decided, we

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[6]Section 503(a)(3), 29 U.S.C. § 1132(a)(3), states:

(a) *Persons empowered to bring a civil action*

A civil action may be brought —

. . . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

reiterated that section 409(a) precludes claims unless they inure to the benefit of the plan as a whole rather than to an individual. *Watkins*, 12 F.3d at 1528. We are bound by that decision.[6]

[5] McLeod does not seek to recover for the plan as a whole. Instead, she requests money damages pursuant to section 502(a)(3) for herself as the potential beneficiary. Consequently, McLeod is precluded from recovering damages for the claim that the appellees breached a fiduciary duty pursuant to section 1104(a)(B) for the failure to act with "the care, skill, diligence and prudence required of a fiduciary under ERISA."[7] *See Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1424 (9th Cir. 1991) (Reinhardt, J. concurring) ("[T]he federal courts have consistently ruled that ERISA plaintiffs may not recover extracontractual damages."), *cert. denied*, 112 S. Ct. 2968 (1992); *Johnson v. District 2 Marine Eng'rs Beneficial Ass'n, — Associated Maritime Officers, Medical Plan*, 857 F.2d 514, 518 (9th Cir. 1988) (finding no need to reexamine the holding of *Sokol* unless the Supreme Court indicates otherwise). We affirm the district court on this issue.

III. *Whether McLeod May Receive Compensatory Damages Under 29 U.S.C. § 1132(a)(3)*

McLeod argues that section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), authorizes a participant to bring a civil action to obtain "appropriate equitable relief" to redress violations of the fiduciary responsibility provisions of ERISA. She argues that the district court erroneously held that the compensatory

---

[6]We are unpersuaded by McLeod's citation of decisions from other circuits. Such decisions do not constitute a change in the law of this circuit. *See Montana v. Johnson*, 738 F.2d 1074, 1077 (9th Cir. 1984) (only en banc decisions of this court, Supreme Court decisions, or subsequent legislation constitute changes in the law).

[7]The district court found: "Finally, I note that the remedy plaintiff seeks would be contrary to the overriding purpose of ERISA to protect *plans* as a *whole*, rather than individual participants."

damages that she requested in her first amended complaint were unavailable under ERISA. She also argues that, pursuant to 29 U.S.C. § 1132(a)(3), she is entitled to recover $100,000 in extra-contractual damages for emotional distress resulting from the failure to obtain cancer coverage.

Recent decisions by the Supreme Court and this circuit foreclose McLeod's arguments. "As the Supreme Court has recently held [in *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2068-70 (1993)], equitable relief in the form of the recovery of compensatory damages is not an available remedy under 20 U.S.C. § 1132(a)(3)." *Watkins*, 12 F.3d at 1520.

IV. *Whether Summary Judgment Was Proper on the Claim for Relief for Failure to Furnish Copies of the Plan Instruments*

McLeod claims that, notwithstanding whether she is entitled to compensatory damages, she is entitled to statutory damages.

ERISA provides in relevant part that:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

29 U.S.C. § 1024(b)(4). McLeod alleges that the appellee failed to comply with this section:

> On October 17, 1991, Plaintiff, through her attorneys, requested the following information from Defendant News-Register pursuant to 29 U.S.C. § 1024(b)(4):

(A) the Plan document;

(B) the Summary Plan Description;

(C) the Annual Report; and

(D) any other instruments in effect under which the Plan was established or operated.

Defendant News-Register responded to Plaintiff's request for information on November 12, 1991, in a letter signed by Joyce Morrow, News-Register Controller. Morrow informed Plaintiff that Defendant News-Register did not have a Plan document, Plan description or an annual report for the Plan.

No. 92-450MA, First Amended Complaint, at 4, paras. 16 & 17.

[6] Because we conclude that McLeod was a participant, she may be entitled to receive statutory damages for the administrator's alleged failure to provide the required plan documentation:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c).

[7] The appellees note that McLeod was provided an employee handbook. The administrator also testified that it was their practice to notify participants of the cancer coverage. Both of these events are alleged to have taken place on April 24, 1990. In October 1991 McLeod asked for the plan in writing and was informed that none existed because the "plan" was represented exclusively by the AFLAC representatives. Both parties use the term "plan" and "policy" interchangeably to discuss the cancer coverage, which confuses the issue as to whether a plan document exists and was provided or not. We do not reach the subissue of whether the cancer coverage was a distinct plan or individual benefit program, as the facts are disputed as to whether the delivery of materials McLeod received constitutes compliance with the statutory requirements. We remand on the issue of whether the appellant is entitled to statutory damages for the administrator's failure to provide her with "plan" documents.[5] *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982) (the court of appeals may resolve the issue only if the record permits but one resolution).

AFFIRMED in part and REVERSED in part. REMANDED for trial on the claim of failure to provide requested documents pursuant to 29 U.S.C. § 1024(b)(4). The parties shall bear their own costs on appeal.

APPENDIX "C"

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CLERK, US DISTRICT COURT
DISTRICT COURT OF OREGON
PORTLAND, OREGON

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PAMELA J. McLEOD,	)	
	)	Civil No. 92-450-MA
Plaintiff,	)	
	)	
v.	)	
	)	
OREGON LITHOPRINT, INC., an Oregon corporation, dba News-Register Publishing Co., et al.	)	OPINION
	)	
	)	
	)	
Defendants.	)	

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MARSH, Judge.

MARSH, Judge.

Plaintiff, a full time employee of defendant News Register Publishing, filed this action under ERISA, 29 U.S.C. § 1132 et seq., alleging that her employer breached a fiduciary duty when it failed to timely notify her of her right to apply for cancer insurance.[3] Plaintiff became eligible, by reason of her length of employment, to apply for coverage on May 1, 1990, but contends that she was not informed of this opportunity until late July, approximately two weeks after she was diagnosed as having cancer. Plaintiff submitted an application for cancer coverage on July 24, 1990 which was granted and later rescinded when the insurance company discovered the previous cancer diagnosis. In addition, plaintiff asserts a claim for statutory damages under 29 U.S.C. § 1024(b)(4) alleging that defendants failed to respond to discovery requests for the cancer plan documentation.

Plaintiff now moves for summary judgment on her claims of breach of fiduciary duty and failure to provide requested plan information.[4] Plaintiff seeks an award of compensatory damages equal to benefits that would have been paid had she elected coverage under the cancer policy, submitted an application, been accepted and paid the premiums. Defendants contend that material issues of fact exist regarding timely notice of the right to pursue cancer coverage and whether they adequately complied with discovery requests. However, defendants seek summary judgment against plaintiff's ERISA claims arguing that, as a matter of law, even if they failed to notify plaintiff about the existence of cancer coverage in a timely manner, plaintiff cannot recover the monetary damages under ERISA because she is not a plan "participant" and is guilty of unclean hands.

3

There is no dispute that the employer, News Register, is an ERISA plan administrator and a "fiduciary" under ERISA.

4

Plaintiff's claims against AFLAC, the insurance company which made the cancer policy available to News Register employees, and Bret Runolfson, AFLAC's agent, have been settled.

Both parties agree that the issue of whether plaintiff is a plan "participant" as defined by ERISA is a legal question which should be resolved by the court with their submissions on these motions. For the reasons which follow, plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted.

DISCUSSION

1. Is Plaintiff a Plan "Participant?"

Section 1451(1) of title 29, the jurisdictional basis for an action under ERISA, provides that a "plan fiduciary, employer, plan participant or beneficiary who is adversely affected by the act or omission of any party under this subtitle . . . may bring an action for appropriate legal or equitable relief." Section 1132(a) outlines available civil remedies and provides that "[a] civil action may be brought -- (1) by a participant . . . -- (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

Section 1002(7) defines a "participant" as "any employee or former employee of an employer .. who is or may become-eligible to receive a benefit of any type from any employee benefit plan which covers employees of such employer."

In Firestone Tire & Rubber Co. v. Bruch, 109 S.Ct. 948 (1989), plaintiffs sought updated plan summary descriptions pursuant to 29 U.S.C. § 1024 against their former employer, Firestone, following the sale of Firestone's plastics division to another company. The district court denied the requested relief finding that plaintiffs were no longer plan "participants." The Third Circuit Court of Appeals reversed, holding that the right to request and receive information "extends both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not." Id., at 952, citing 828 F.2d 134, at 153. The

Supreme Court reversed the Third Circuit's holding, finding that the court's interpretation of the term participant to include potential claimants, "strays too far from the statutory language." Id., at 957. Under the Supreme Court's formulation, "participants" are only those employees for former employees who have a "colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." Id., at 958. In a concurrence, Justice Scalia took this definition one step further:

"I think that, properly read, the definition of 'participant' embraces those whose benefits have vested, and those who (by reason of former employment) have some potential to receive the vesting of benefits in the future, but not to those who have a good argument that benefits have vested even though they have not."

Id., at 959 (emphasis added).

Prior to the Supreme Court's decision in Firestone, the Ninth Circuit made a similar holding in a case filed by former employees who had already received their vested benefits in a lump sum payment who filed an action against the plan administrator for breach of fiduciary duties and failure to disclose relevant plan documents. Kuntz v. Reese, 785 F.2d 1410 (9th Cir. 1986). In Reese, the court held that plaintiffs were not "participants" as defined by § 1002(7) because "if successful, the plaintiffs' claim would result in a damage award, not in an increase of vested benefits." Id., at 1411. The court reasoned that Congress did not intend to convert claims of all types into "potential benefits" within the meaning of ERISA. Id., at 1412.

Section 1104 governs duties owed by a fiduciary to "participants and beneficiaries" and directs that fiduciaries act with care in providing benefits, diversifying investments and defraying all reasonable expenses in administering the plan. Section 1021 mandates that the plan administrator provide a summary plan description to "each participant covered under the plan and to each beneficiary who is receiving benefits under the plan." Thus, if

plaintiff is a "participant" or plan "beneficiary," defendants had a duty to provide her with a description of the plan "with care." Conversely, there is no authority imposing a duty of care upon fiduciaries with respect to any person who is neither a plan participant nor beneficiary. See e.g. Alton Memorial v. Metropolitan Life Ins., 656 F.2d 245, 249 (7th Cir. 1981) (employer owes no duty to plan actuary).

The parties have not cited, nor have I been able to find, any case in which a plaintiff has premised an ERISA claim on a failure to disclose the existence of an available policy. Decisions under ERISA for non-disclosure usually address issues related to claims filed by persons who elect coverage and thereafter contend that a fiduciary failed to disclose a change in benefits or an aspect of the benefit package which resulted in a reduction in anticipated benefits. For example, in Olson v. General Dynamics Corp., 960 F.2d 1418 (9th Cir. 1992), plaintiff claimed he was misled about the amount of benefits he would receive following the change of ownership of his employer. The court noted that "at the time he filed this suit, Olson was receiving benefits from all three companies [and] . . . was therefore a participant in each company's employee benefit plan . . . " Id., at 1422. See also Greany v. Western Farm, No. 91-35098, slip op. 10519, at 10530 (9th Cir. Sept. 1, 1992) (plaintiffs must have received health benefits under policy to state claim for mistakes re date of termination for conversion policy) and National Co.'s Health v. St. Joseph's Hospital, 929 F.2d 1558 (11th Cir. 1991) (failure to notify employee about continuation coverage).

The undisputed evidence regarding the various benefit programs offered by defendants is that defendants offered three different health policies to all full time employees: a medical insurance policy with Blue Cross, a disability policy with Standard Insurance and the cancer policy with AFLAC. Each policy was optional and, if the employee elected coverage under one or all three policies, premiums were paid for by contributions from both the employee and the employer and were deducted from payroll. The AFLAC cancer coverage option was a separate individual policy issued to the employee.

The "personal choice account"[5] was clearly a "benefit plan" and is described as a benefit plan in the summary plan description. However, the personal choice account did not offer medical benefits-- it was not a separate benefit program, but an optional method of payment. Employees who wished to pay for their share of the medical insurance premiums or cancer insurance premiums from before tax dollars could elect to make those payments via a "personal choice account." The personal choice account could not be used to pay for Standard's disability insurance premiums. The parties also do not dispute that plaintiff elected to apply and did obtain coverage under the Standard Insurance disability policy and declined Blue Cross medical coverage. Thus, plaintiff's "membership" in the personal choice account is limited to the brief period in which she obtained cancer coverage under the AFLAC policy.[6]

Plaintiff contends that she was a participant in the "plan" because, as a full time employee who had been working for 90 days as of May 1, 1990, she was eligible to elect coverage under any of the three different policies offered through her employer.[7] In

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The parties and the plan summary also describe the personal choice account as a "cafeteria" or "flexible spending account plan."

6

It is undisputed that, at the time she filled out the application for cancer insurance with AFLAC, plaintiff omitted her recent cancer diagnosis from the application form. Once AFLAC discovered the omission, it immediately terminated the policy and returned the premiums to the plaintiff. Plaintiff contends that she withheld the information on the advice of Morrow. Regardless of the "unclean hands" of either party with respect to the disclosure to AFLAC, plaintiff's theory is that had she known about the AFLAC policy in May of 1990, she would have exercised the option, obtained the policy and would have been validly covered under the policy in July when she discovered she had cancer.

7

If plaintiff is inferring that the employee handbook was a "plan" this theory also must fail. Although the handbook describes each of the available benefit options for qualified full-time employees, it was an merely overview and not a summary plan description under ERISA. See Gridley v. Cleveland

addition, plaintiff contends that she was a participant in a "personal choice account" which includes payment of premiums for the AFLAC cancer policy as a component of the plan. Defendants argue that each benefit insurance policy constitutes a separate "plan" for the purpose of determining whether plaintiff is a plan "participant." Thus, the issue presented is whether plaintiff's eligibility for participation in any of the defendants' proffered policy options is sufficient to give her "participant" standing for the purposes of this ERISA claim.

The ERISA statute which defines a "welfare benefit plan" sheds little light on the dispute in this case. A "plan" is simply any program established or maintained by an employer "for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . benefits in the event of sickness." 29 U.S.C. § 1002(1). I agree with plaintiff that the fact that an employer offers more than one benefit option package to its employees does not alter the fact that a plan is a "plan" for the purposes of ERISA. See Brundage-Peterson v. Compcare Health Services, 877 F.2d 509, 511 (7th Cir. 1989). However, plaintiff's contention that the decision in Brundage necessarily ends the issue of whether plaintiff is a plan participant is ill-founded. In Brundage, the plaintiff filed a state breach of contract action directly against the insurance company which issued her policy for a denial of benefits for medical expenses incurred when she suffered an "unusual illness." The insurance company removed the case to federal court on the basis of ERISA preemption because plaintiff had obtained the policy through her employer and the employer contributed premiums and collected and remitted premium payments via payroll withholding. The court held that the contractual arrangements between the insurance company and the employer, the eligibility requirement of being an employee for a certain period of time and the employer's contributions were sufficient to find that the coverage was part of a "plan" under ERISA. Id., at 510-511. There was no dispute that Brundage was a participant in the plan at

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Pneumatic Co., 924 F.2d 1310 (3rd Cir. 1991) (plaintiff could not rely on overview brochure to contradict provision in policy enrollment card).

issue because she had elected coverage under defendant's policy and been denied benefits thereunder.

What cases like Brundage and Firestone, Reese and Olson demonstrate however, is that "participant" status depends upon a plaintiff's claim for benefits or other rights under the terms of an existing and valid policy. Thus, regardless of whether we view defendants' plan as a group of policies or we view the policies as a group of separate plans, liability under ERISA is governed by the express provision of § 1132(a) which provides for a civil action by a participant to recover, clarify or enforce benefit provisions. Like the claim in Reese, if successful, plaintiff's claim would result in a damage award, not a payment of "benefits" under the any plan provision. There is simply nothing in the statute which would extend liability to a claim for coverage under a policy that was never validly issued.

An additional justification for limiting ERISA's remedial scope to claims related to benefits, as opposed to a claim for coverage, becomes clear when I consider the possible remedies available against the employer even if I found plaintiff could establish a breach of an ERISA fiduciary duty. In this case, plaintiff seeks monetary compensation against the employer for damages equal to medical benefits that would have been paid had she been notified about the availability of cancer insurance in May of 1990 and exercised her option to obtain such a policy. Plaintiff does not dispute that so-called "extra-contractual damages" such as punitive damages or emotional distress damages may not be recovered under ERISA. See Olson, 960 F.2d at 1424, Reinhardt, J. concurring, citing Sokol v. Bernstein, 803 F.2d 532 (9th Cir. 1986) (other citations omitted). Instead, plaintiff labels her prayer as "equitable" in nature and, thus, permissible as "such other appropriate equitable relief" permitted under 1132(a).

While plaintiff may label her prayer as "equitable" in nature, I find that she is in essence seeking extra-contractual compensatory damages which are unavailable under ERISA. For example, in Sokol, the Ninth Circuit rejected a similar argument

against a plan fiduciary for emotional distress damages. The plaintiff, a named beneficiary in a pension plan policy, claimed that a trustee distributed trust funds without her authorization. The court rejected the claim and held that the "equitable relief" referenced in § 1132 was meant to provide declaratory or injunctive relief. In so holding, the court noted that "where a statute expressly provides a particular remedy, a court must be chary of reading others into it." Id., at 536, citing Massachusetts Mutual Life Ins. Co. v. Russell, 105 S.Ct. 3085, at 3093 (1985).[8] Thus, because ERISA does not provide for a cause of action for failure to notify an eligible employee about coverage options (as opposed to benefits available after coverage is obtained), I will not read as such an expansion into the statute.

Finally, I note that the remedy plaintiff seeks would be contrary to the overriding purpose of ERISA to protect plans as a whole, rather than individual participants. See Williams v. Caterpillar, Inc., 944 F.2d 658, 665 (9th Cir. 1991) (dismissal of claims by plan participants for oral misrepresentations which had no impact upon plan itself); compare Amalgamated Clothing & Textile Workers v. Murdock, 861 F.2d 1406, 1411 (9th Cir. 1988) (plaintiffs had standing to seek constructive trust against plan fiduciary for alleged misuse of plan assets). Because the remedy plaintiff seeks in this case is personal to her and would have no direct effect on any aspect of the "plan" or defendants' administration of the health insurance options available to employees, her claim for benefits she would have received under the cancer policy if it had been issued must fail under ERISA.[9]

---

[8] Even if plaintiff established a violation of a fiduciary duty against defendants, the "breach" by the employer would be the loss of the employer's premium contributions for the period of coverage. This was not a self-funded plan and, thus, the employer-defendants were never contractually obligated to provide medical benefit coverage.

[9] Given the limited equitable relief available under ERISA, even if plaintiff could maintain an action for breach of a fiduciary duty, her relief would be an order that she be given notice of the cancer coverage, which was satisfied in July of 1990, mooting any potential claim for injunctive relief.

Based on the foregoing, I find that plaintiff is not a "participant" or "beneficiary" with respect to the AFLAC cancer coverage, and, thus, lacks standing to maintain an ERISA claim against her employer for breach of fiduciary duties or failure to provide AFLAC plan documents. Further, I find that, even if plaintiff had standing, she could not recover the type of compensatory damages sought in this case. I am fully cognizant of the fact that, with my earlier dismissal of plaintiff's common law claim for negligence against defendants on the basis that such claims are preempted by ERISA, plaintiff is now, essentially, without a remedy against her employer. However, the courts have recognized that ERISA has created a "gap," but that such a gap does not undermine the reasoning behind ERISA's broad preemptive reach. Olson, 960 F.2d at 1423. I find that this is one of those cases that falls within that "gap." Accordingly, defendants' motion for summary judgment #40 is granted and plaintiff's cross-motion for summary judgment #36 is DENIED.

DATED this 29 day of October, 1992.

/S/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

Supreme Court, U.S.
FILED
APR 18 1997
CLERK

No. 96-1503

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PAMELA J. MCLEOD,

Petitioner,

v.

OREGON LITHOPRINT, INC., dba
NEWS-REGISTER PUBLISHING CO., and
NEWS-REGISTER EMPLOYEES' INSURANCE PLAN

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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11 pp

STATEMENT PURSUANT TO RULE 29.6

Respondents have no parent companies and no subsidiaries that are not wholly owned.

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I. STATEMENT OF THE CASE

Petitioner misstates the question. The question presented -- i.e., the question the pleadings raised, the parties briefed, and the Court of Appeals decided (against petitioner) -- is whether compensatory damages are available under section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), codified at 29 U.S.C. § 1132(a)(3), which gives retirement plan participants a right of action against plan fiduciaries for "appropriate equitable relief."[1]

---

[1] Section 502 reads:

> (a) *Persons empowered to bring a civil action*
>
> A civil action may be brought --
>
> . . . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

II. REASONS TO REVIEW

The Court should deny review because the question presented -- does "appropriate equitable relief" include compensatory damages? -- has already been answered, and not so very long ago, in Mertens v. Hewitt Assoc., 508 U.S. 248 (1993). Mertens held that "equitable relief" refers to those categories of relief that were "typically" available in equity -- injunction, mandamus, and restitution -- and does not include damages, 508 U.S. at 256-58, which is all petitioner seeks. She wants respondents to pay her a sum of money equal to the benefits she would have received under the cancer insurance policy that she says she would have bought if only respondents had told her she was eligible. That sum of money is damages, plain and simple, although petitioner strives to avoid that word. And it is not available under Section 502(a)(3), if Mertens is still authoritative.

Petitioner claims the relief she seeks is not really damages, but rather a form of restitution. Not so. Restitution is a procedure for compelling the return of misappropriated

funds, thus preventing unjust enrichment. Respondents have no funds belonging to petitioner even if they caused her to miss out on the cancer insurance policy, as she alleges. Although petitioner seeks a sum of money equal to the benefits she would have received under the policy, she does not seek the benefits themselves. Nor could she seek them -- at least not in this action -- because respondents don't have them. If anyone has them, it's the cancer insurer, not respondents. There being no ill-gotten funds and no unjust enrichment, there can be no restitution.

Petitioner says review is necessary to resolve a conflict in the circuits regarding the availability of damages under Section 502(a)(3). But there is no conflict, except among pre-Mertens cases, which are no longer good law. Every circuit that has considered this issue since Mertens has held that compensatory damages are not available in a Section 502(a)(3) action. See Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11, 13 (1st Cir. 1994); Hein v. F.D.I.C., 88 F.3d 210, 224 (3rd Cir. 1996), cert. denied __ U.S. __, 117 S.Ct. 683 (1997);

Zimmerman v. Sloss Equip., Inc., 72 F.3d 822, 829 (10th Cir. 1995). Fraser v. Lintas: Campbell-Ewald, 56 F.3d 722, 725 (6th Cir. 1995), cert den, ___ U.S. ___, 116 S.Ct. 477 (1995).[2]

Plaintiff cites cases from the Third, Sixth, and Eighth Circuits, which hold, she says, that monetary relief is available under Section 502(a)(3). But with one exception, those were all actions to recover wrongfully withheld benefits from the benefit-provider, not, as here, actions for damages from some third party measured by the lost benefits. The one exception is Warren v. Society Nat. Bank, 905 F.2d 975 (6th Cir. 1990), cert. denied 500 U.S. 952 (1991), which squarely held that Section 502(a)(3) "permits the recovery of compensatory damages to address a direct injury to a participant by a fiduciary that allegedly violated its contractual duty under the terms of the retirement plans and under the provisions of ERISA." 905 F.2d at 981. But even the Sixth Circuit now concedes that, in light

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[2] Two other circuits anticipated Mertens and rejected damages claims under Section 502(a)(3) before this Court's ruling in that case: Lee v. Burkhart, 991 F.2d 1004, 1011 (2nd Cir. 1993), and Novak v. Andersen Corp., 962 F.2d 757, 760-61 (8th Cir. 1992), cert. den. __ U.S. __, 113 S.Ct. 2928 (1993).

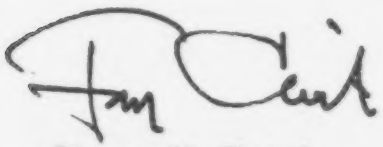
of Mertens, Warren is no longer good law. "In our view," the court said recently, "Mertens effectively overrules Warren." Fraser v. Lintas: Campbell-Ewald, 56 F.3d at 725.

Without a true, inter-circuit conflict, there is no reason for the Court to hear this case, unless it is prepared to overturn Mertens so soon after it was decided. But petitioner offers no good reason for doing so. She complains that, unless Mertens is disturbed, plan participants will be left without a remedy for misdeeds and mistakes of plan fiduciaries. But even with Mertens plan participants are not remediless; they are still entitled to "appropriate equitable relief." If that remedy is generally inadequate -- and petitioner has not shown that it is, she merely speculates to that effect -- then she should apply to Congress for a change in the law. It is not for the courts to correct perceived "problems" in statutory language, especially when the language is part of "an enormously complex and detailed statue that resolve[s] innumerable disputes between powerful competing interests." Mertens, 508 U.S. at 262.

III. CONCLUSION

The Court should deny the petition.

Respectfully submitted,



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Supreme Court, U.S.
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No. 96-1503

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PAMELA J. MCLEOD, Petitioner,

v.

OREGON LITHOPRINT, INC., dba News-Register Publishing Co.; and NEWS-REGISTER EMPLOYEES' INSURANCE PLAN, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

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REASONS FOR GRANTING PETITION

PETITIONER'S REPLY

The initial question presented for review is whether the ERISA provision permitting "appropriate equitable relief" includes the monetary recovery of lost benefits resulting from a breach of a fiduciary's duties to a participant.

Respondent's Opposition Brief to the Petition for Certiorari illustrates the differing approaches to the question which will ultimately have to be resolved by this Court.

Respondent argues for the approach adopted by the Ninth Circuit which holds that common law trust remedies to restore lost benefits would constitute "compensatory damages" and are therefore unavailable. Respondent and the Ninth Circuit rely upon an extension of this Court's decision with respect to claims against non-fiduciaries in Mertens v. Hewett & Assoc. 508 U.S. 248 (1993) to include all claims against plan fiduciaries under any circumstances.[1]

Contrary to Respondent's argument, it is not necessary to overturn Mertens in order to decide the question presented in this case. Petitioner's position in the case is entirely consistent with this court's holding in Mertens which expressly recognized that the scope of "appropriate equitable relief" must be determined under the circumstances of each case. Mertens 1135 S.Ct. 2068-69. The Mertens decision involved the conduct of a non-fiduciary and does not reach the question of whether negligent fiduciaries may be charged with the restoration of benefits lost as a result of

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[1] The contrary view which has been applied by the Third, Sixth and Eighth Circuits holds that common law trust remedies which may impose liability on a plan fiduciary to restore lost benefits should be applied to place the beneficiary in the position he or she would have been if the trustee had not committed a breach of trust. See: Restatement (Second) of Trusts, Section 205, comment a (1959)(". . . trustee ...chargeable with any loss ... resulting from a breach of trust).

their breaches.

Any resolution of the issue must also be consistent with Varity Corp. v. Howe, 516 U.S. ___ (1996) in which 29 U.S.C. Section 1132(a)(3) was recognized as a catch-all safety net which must be available to provide a remedy for breaches of fiduciary duty where no other remedy exists under the statute.

Respondent asserts that no "true inter-circuit" exists with respect to the question of whether lost benefits may be restored as appropriate equitable relief. However, Respondent does not explain how the Eighth Circuit decision in Howe v. Varity Corp, [2] and the Third Circuit's decision in the case of In re Unisys Corp. Retiree Medical Benefits "ERISA" Litig. [3] can be reconciled with the Ninth Circuit's view in McLeod. [4]

Respondent relies on Hein v. F.D.I.C., 88 F.3d. 210 (3rd Cir. 1996) to suggest that the Third Circuit view with respect to the recovery of lost benefits is not in conflict with the Ninth Circuit. In Hein, the plaintiff was attempting to recover amounts which he was not entitled to receive under the Plan. Because no connection was shown in Hein between any breach of fiduciary duty and the fact that plaintiff was not entitled to benefits, the case never reached the question of whether plaintiff was entitled to recover benefits for which he had been wrongfully deprived. The court in Hein did not refer to or question the validity of the approach or the holding in the Unisys case.

The current status of the Sixth Circuit's position on this issue is less clear. The Sixth Circuit's decision in Warren adopted an approach similar to that adopted by the Third and Eighth Circuits. A later panel of the Sixth circuit indicated in

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[2] 36 F.3d. 746, clarified 41 F.3d. 1263 (1995), other issues aff'd 516 U.S. ___ (1996)

[3] 57 F.3d. 1255 (3rd Cir. 1995), cert. den. 116 S.Ct. 1316 (1996)

[4] Both the Third Circuit and Eighth decisions were issues after Mertens.

dicta that it believed that the Warren decision was overruled by Mertens. See: Fraser v. Lintas: Campbell-Ewald, 56 F.3d. 722, 725 (6th Cir. 1995). However, the decision in Fraser was decided on other grounds and the court never actually reached the question at issue here.

Respondent attempts to distinguish this case from the decisions of the Third and Eighth Circuits because the benefits here were to have been provided from an insurance policy rather than from the general assets of the employer as in the other cases. Respondent states:

> "...[T]hose were all actions to recover wrongfully withheld benefits from the benefit provider, not, as here, actions for damages from some third party measured by the lost benefits." (Opposition Brief, p. 4)

It is extremely significant that the "some third party" which Respondent refers to in the above quotation is the Plan Administrator and a fiduciary charged with the duty of acting an the best interests of the participants. In both Howe v. Varity Corp, and Unisys, the liability was placed upon the defendants due to their actions as plan fiduciaries and not because they had agreed to provide benefits under the terms of the plans from their general assets. The fact that Respondent's plan provided for benefits to be paid from an insurance policy rather than from the general assets of the employer is not relevant to Respondents liability as a fiduciary.

Respondent incorrectly suggests that the question of whether of not the fiduciary should be surcharged in the amount necessary to restore the lost benefits has not been raised by the pleadings, briefed or decided by the court of Appeals. To the contrary, the Court of Appeals specifically noted the relief requested in the Amended Complaint [5] and described the Plaintiff's claim as seeking to be made whole

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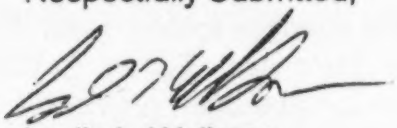
[5] See: Petition for Cert., App. "B," p. 12.

through a recovery of an amount equal to her lost benefits.[6]

Dated this 25th Day of April, 1997

Respectfully Submitted,



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October 1996

[6] "...[S]he seeks to be made whole through an award of money damages equal in amount to the benefits that she would have been paid and compensation for her emotional distress." See: Petition for Cert., App., "A," p. 4.